Supreme Court, U.S.
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86-1225

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ROBERT L. KRAUSE,

Petitioner

v.

MARK K. KIM, M.D. d/b/a)
MARK K. KIM, M.D., P.A.)
and METROPOLITAN MEDICAL)
CENTER, a Corporation)
)
LAWRENCE A. FARBER, M.D.)
and NORAN NEUROLOGICAL)
CLINIC, P.A.),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

Robert L. Krause
Attorney Pro Se
8131 Westwood Hills Drive
St. Louis Park, MN 55426
(612) 545-3931

January, 1987

QUESTION PRESENTED

Petitioner, proceeding pro se in two (consolidated) civil lawsuits alleging medical malpractice and other causes of action, was subjected to:

a. The denial of his request for a continuance of a hearing on a motion to dismiss which had been brought untimely under Minnesota Rules of Civil Procedure for District Courts.

b. The failure by the District Court to have hearing on summary judgment and dismissal motions reported and transcribed by a court reporter.

c. The granting of a motion to dismiss based on the unilateral affidavit of opposing counsel, claiming Petitioner had not named expert witnesses.

d. The failure of the District Court to consider evidence properly tendered by Petitioner in connection with summary judgment proceedings.

e. The failure of the District Court, upon Petitioner's Motion for Relief from Judgment and Rehearing, to:

   i) Deal with the motion in light of Rule 60.01 and

60.02;

ii) Have the entire hearing reported and transcribed by a Court Reporter (as requested by Petitioner);

iii) Compel the Court Reporter to prepare, certify and file a transcript of the part of the hearing that she reported, which had been duly ordered and paid for by Petitioner, as required by Minnesota Rules of Civil Appellate Procedure.

f. Failure of Appellate Courts of Minnesota to acknowledge that Petitioner's Motion to Vacate and for Rehearing was based on Rule 60.02 as well as Rule 60.01, Minn. Rules of Civil Procedure for District Courts.

Under the circumstances referred to above, was the Petitioner deprived of rights protected by the:

1. First Amendment to the U.S. Constitution guaranteeing the right to petition the government for the redress of grievances, in that Petitioner's cases were dismissed before all relevant facts and arguments could be presented.

2. Due process clause of the Fourteenth Amendment to the United State Constitution, in that procedural rules of court designed to apply to all litigants in Minnesota were ignored in dealing with Petitioner.

3. Equal Protection clause of the Fourteenth Amendment to the United States Constitution in that Petitioner, a pro se litigant, was not afforded the uniform application of the rules of court as required.

4. Seventh Amendment to the United State Constitution and the Minnesota Constitution, Sec. 4, guaranteeing the right to trial by jury, in that summary despositions of Petitioner's cases were made before all relevant

facts were available through the discovery process.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Robert L. Krause, and the Respondents, Mark K. Kim, M.D., d/b/a Mark K. Kim, M.D., P.A. and Metropolitan Medical Center, a Corporation, in one case, and, in a related, consolidated, case, the Petitioner, Robert L. Krause, and the Respondents, Lawrence A. Farber, M.D. and Noran Neurological Clinic, P.A.

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Respondents.

The Petitioner, Robert L. Krause, respectfully prays that writ of certiorari issue to review the Order of the Minnesota Court of Appeals filed June 4, 1986.

OPINIONS BELOW

The Opinion of the Minnesota Court

of Appeals, filed June 4, 1986, is reprinted in the appendix hereto.

The District Court decision, filed March 21, 1986, is reprinted in the appendix hereto.

The Minnesota Supreme Court decision, filed August 20, 1986, declining to review, is reprinted in the appendix hereto; and its Order deny ing Petitioner's motion for reconsideration, dated September 22, 1986, is reprinted in the appendix hereto.

JURISDICTION

The final order of the Minnesota Supreme Court was entered September 22, 1986. On December 16, 1986, Mr. Justice Blackmun extended the time for filing Petition for Writ of Certiorari to and

including January 20, 1987. The jurisdiction of this Court is invoked under 28 U.S. Codes, Sec. 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

1. United States Constitution

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free excercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by

a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. State of Minnesota Constitution, Article 1

§4. Trial by jury

Sec. 4. The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy. A jury trial may be waived by the parties in all cases in the manner prescribed by law. The legislature may provide that the agreement of five-sixths of a jury in a civil action or proceeding, after not less than six hours' deliberation, is a sufficient verdict.

3. Minnesota Rules of Civil Procedure for District Courts

RULE 60. RELIEF FROM JUDGMENT OR ORDER

Rule 60.01. Clerical Mistakes

Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on

the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected with leave of the appellate court.

Rule 60.02. Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment (other than a divorce decree), order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons: (1) Mistake, inadvertance, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.03; (3) fraud (whether heretofore denominated intrinsic

or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceedings was entered or taken. A motion under this Rule 60.02 does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order,

or proceeding, or to grant relief to a defendant not actually personally notified as provided in Rule 4.043, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

4. Minnesota Rules of Civil Appellate Procedure, Rule 110.02

Subd. 2. Transcript Certificate. If any part of the proceedings are to be transcribed by a court reporter, a certificate as to transcript signed by the designating counsel and by the court reporter shall be filed with the clerk of the appellate courts, with a copy to

the trial court and all counsel of record within 10 days of the date the transcript was ordered. The certificate shall contain the date on which the transcript was requested; the estimated number of pages; the estimated completion date not to exceed 60 days; and a statement that satisfactory financial arrangements have been made for the transcription. Upon delivery of the transcript to the appellant, the reporter shall file with the clerk of the appellate courts a certificate evidencing the date of delivery.

5. Minnesota Code of Judicial Conduct, Canon 3, A.(4)

(4) A judge should accord to every person who is legaly interested in an proceeding, or his lawyer, full right to be heard according to law, and, consider ex parte or other communications con-

cerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonalbe opportunity to respond.

6. Code of Professional Responsibility, Canon 7,

EC 7-35 All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary procedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one

party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if thereis none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

EC 7-36. Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity

and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears. He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

EC 7-38. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be

punctual in fulfilling all professional commitments.

STATEMENT

This Petition relates to two cases Petitioner commenced in District Court, Hennepin County, Minnesota. The relevant facts are as follows:

A. Krause v. Farber; et al.

From on Feb. 23, 1978 until about November 8, 1980, Petitioner was a patient for medical care and treatment of Respondents Farber and Noran Neurological Clinic in connection with injuries Petitioner sustained in an automobile accident in 1976. Dr. Farber had agreed to provide expert testimony on Petitioner's behalf in a lawsuit Petitioner had commenced for the damages he sustained in the 1976 accident. In July, 1980, Petitioner was seen by Dr. Farber at the Noran Clinic, and was told

by Dr. Farber to return for further examination and treatment in January, 1981, following review by Dr. Farber of x-rays, neck-scan, radiologists' reports, and other medical reports from Abott-Northwestern Hosptial. On or about Nov. 10, 1980, Petitioner learned, to his surprise, by reading Dr. Farber's deposition given October 31, 1980, that Dr. Farber's deposition given October 31, 1980, that Dr. Farber had misled Petitioner and had done the acts complained of in Petitioner's Complaint. Petitioner then and there decided to terminate the doctor-patient relationship between said Defendants and himself.

Within two years of that incident, Petitioner caused to be served on each Respondent a Summons and Complaint. Thereafter, discovery commenced. All

parties, including Petitioner, responded to various discovery requests, although Petitioner has received negligible cooperation from Respondents in obtaining meaningful discovery. Petitioner was deposed. No party ever served a Trial Note Of Issue. No trial date was ever set. Discovery has not been completed.

The Respondent's Summary Judgment motion heard December 27, 1984, was based on two arguments: 1) That Petitioner's action was barred by the statute of limitations; and 2) That summary judgment should be granted because Petitioner had not identified an expert witness necessary to create a prima facie case of medical malpractice. The Court's decision was based solely on the statute of limitations issue.

The day prior to the hearing,

Petitioner made a written request for a continuance. The request was renewed on the date of the hearing. The request was not granted.

The proceeding was not reported, and the parties have differing recollections of what transpired at the hearing.

B. Krause v. Kim; et al.

In December, 1979, Respondent Kim (upon referral from Dr. Farber) treated Petitioner at Dr. Kim's Pain Clinic at the Metropolitan Medical Center, Minneapolis, Minnesota, with the final in-office treatment occurring on December 24, 1979. Treatments included nerve block and acupuncture procedures. After these treatments, further treatments were suspended pending delivery of a report to Dr. Farber (which Dr. Kim promised to send immediately). This report, dated March 1, 1980, included

false and incorrect statements injurious to Petitioner.

Petitioner sustained injuries as a result of said treatments and said report, and accordingly brought suit, delivering Summons and Complaint to the Hennepin County Sheriff's Office for service on December 9, 1981. Metropolitan Medical Center was served on December 18, 1981, but Respondent Kim, although employed at said institution, was not served there, although efforts were made. The Summons and Complaint were forwarded to Carver County Sheriff when the Hennepin County Sheriff determined that Dr. Kim resided just outside the Hennepin County limits. Dr. Kim was then served by the Carver County Sheriff on January 15, 1982.

After January 15, 1982, Respondent served their Answer, and discovery com-

menced. All parties, including Petitioner, responded to discovery requests, although Petitioner received negligible cooperation from Respondents in obtaining meaningful discovery. Respondent Kim and Petitioner were were deposed, as was Frank Larkin, Administrator of Metropolitan Medical Center. No party ever served a Trial Note of Issue. No trial date was ever set. Discovery has not been completed.

Both cases were consolidated for pretrial proceedings and/or trial by Court Order. Motions for Summary Judgment and for Dismissal were heard on December 27, 1984. The Motion of Respondent Metropolitan Medical Center was undisputably not timely filed.

No record was made at the hearing, and the parties have differing recollections of that proceeding.

The day prior to the hearing, Petitioner made a written request for continuance. The request was renewed on the date of the hearing. The request was not granted.

On January 21, 1985, the District Court entered its Order: 1) Granting the motions for summary judgment; 2) directing that Petitioner's Complaint be dismissed as to Metropolitan Medical Center, if certain interrogatories were not answered within 20 days. Petitioner filed his response on February 14, 1985, and subsequently supplemented it with the required information. However, the Court dismissed Petitioner's action against Metropolitan Medical Center, based on Respondent's Affidavit.

Judgments entered against Petitioner and in favor of each of the Respondents.

Petitioner filed Appeals with the Appellate Courts in Minnesota, which were rejected.

Petitioner also filed, in a timely and appropriate manner, a Motion, relating to both cases, Motions pursuant to Rule 60.01 and 60.02 for Rehearing and Relief from Order and Judgments. Petitioner's arguments included, inter alia, that relief should be granted "...in the Interest of Justice, Upon Considerations of Due Process, Equal Protection, and Fundamental Fairness."

The District Court failed to address any of Petitioner's arguments relating to Rule 60.02, and ignored the Equal Protection and Due Process of Law issues entirely. Accordingly, Petitioner appealed the District Court's Ruling, carrying to the Appellate Courts the Constitutional arguments.

The Minnesota Courts of Appeals failed to address the various issues raised on appeal, and erroneously characterized the appeal as relating solely to clerical errors. As a result, that Court mistakenly concluded that the Order appealed from was non-appealable. The Minnesota Supreme Court denied Petitioner's Petition for Further Review and Petitioner's Motion for Reconsideration.

Petitioner's substantial Constitutional arguments were implicitly and explicitly prenseted through all levels of proceedings, consistently and throughout the issues of the disparate treatment accorded him as Plaintiff Pro Se, and stressing his right to have his action heard, on their merits, by a jury.

REASONS FOR GRANTING THE PETITION

> A natural person who is a party to an action may appear in his own proper person or by attorney.
>
> 7 Am Jur 2d, Attorneys at Law §6

The right of an individual to represent himself in Court is well established. Osborne v. President, Directors & Co. of Bank, 22 U.S. 738, 6 L. Ed. 204 (1824).

This right to appear "pro se" is at the very heart of the issues raised in this Petition for Writ of Certiorari.

From the outset of the litigation, Petitioner's efforts to obtain discovery were thwarted at the same time extensive and unreasonable demands were placed upon Petitioner. A review of the voluminous District Court files will illustrate this.

In December, 1984, the Respondents filed and served Motions for Summary Judgment and/or dismissal. The motions of two of the Respondents, for Summary Judgment, met the 10 day notice requirement under the applicable Rules, but, due to week-ends and Christmas Holidays, allowed Petitioner only 2 or 3 work days to prepare for hearings on which all Petitioner's claim could be lost. Access to law libraries, photocopying equipment, etc., was very limited during this period. Accordingly, Petitioner, following proper procedure, tendered a written request for a continuance.

The continuance request also applied to Respondent Metropolitan Medical Center's motion to dismiss, scheduled for the same date. That motion was not served in a timely fashion. That is undisputed. Despite

the unfairness of the District Court ignoring its own rule regarding advance notice for hearing motions; despite the fact that motions for continuances under such circumstances are routinely granted; and despite Petitioner's proper, written request for a continuance, renewed orally in Court prior to the hearing, no continuance was granted, and Petitioner, feeling ill and unprepared, had to respond to two summary judgment motions and a dismissal motion with his lawsuits "on the line."

The court granted the summary judgment motions as to all Respondents except Metropolitan Medical Center, and agreed to dismiss Petitioner's complaint as to that Respondent unless Petitioner would provide sufficient information to satisfy said Respondent regarding

Petitioner's expect witness(es). Petitioner subsequently supplied what he believes to be sufficient information (all the information he had at that point), but apparently that was not sufficient, and the action was dismissed.

On appeal, Petitioner learned that the hearing had not been reported by a Court Reporter. This was devastating to Petitioner's appeal because of conflicts in recollections by the attorneys and Petitioner regarding the admission of documents, discussions concerning the requested continuance, and other matters.

In short, Petitioner's substantial lawsuits were destroyed at hearing which should not have been held and at which Petitioner cannot prove what transpired. The Court, in ruling against Petitioner, disregarded evidence properly tendered

by Petitioner concerning when the parties to the the actions were served, e.g., when delivery to the Sheriff was accomplished. More importantly, the Court presumed dates when various statutes of limitation commenced to run before all discovery hearing on those issues had been completed. At this stage, depositions were still being ascheduled (Dr. Farber had not yet been deposed), yet the Court determined, without all the facts yet in, in effect that all claims were for medical malpractice (they weren't) and that the statute of limitations started running on the last occasion the Petitioner had been in the doctors' examining rooms. The District Court's over-simplification of the case was fatal to Petitioner's causes of action.

The appellate courts failed to take

a hard look at the lower court's decision, and affirmed the District Court. Petitioner timely petitioned the District Court for Relief from the judgments, and for Rehearing under Rules 60.01 and 60.02 of the Minnesota Rules of Civil Procedure for District Courts. Rule 60.01 pertains to clerical errors. Rule 60.02 pertains to mistake, inadvertance, excusable neglect, fraud, etc. Petitioner sought relief under both provisions of the Rule. The District Court and the Minnesota Appellate Courts ignored or missed the fact that Petitioner also sought relief under 60.02. The case relied on by Respondents and the Minnesota Court of Appeals, Cin v. Cin, 372 N.W. 2d 10 (Minn. App. 1985), determined that an order denying a motion to set aside a judgment because of clerical error under

Minn. R. Civ.P. 60.01 is not an appealable order. It did not conclude that the denial of a motion under 60.02 was not appealable.

One reason the Appellate Court failed to examine sufficiently the issue raised in Petitioner's appeal from the denial of his Motion under Rules 60.01 and 60.02 was because it did not have a transcript of the proceedings below.

The District Court initially refused Petitioner's request to have the Motion hearing reported by a Court Reporter, but, part-way through the hearing acceded and had a Court Reporter take down the latter part of the proceedings. On appeal, Peititioner ordered and paid for transcript. Petitioner received an uncertified transcript fraught with errors. He requested, in timely fashion, the

certified transcript required under the appellate Rules. Despite numerous requests, the transcript was never filed nor delivered to Petitioner.

Peitioner's litany of disparate treatment is extensive. As a whole, they have resulted in a denial to Petitioner of his right under federal and Minnesota Constitution to effectively petition to obatin redress of grievances, and to have his claims determined, on the merits, by jury trial. Although Petitioner is representing himself in this matter, he has consulted with various attorneys during the course of these proceedings, and has in fact had counsel represent him in the initial appeals to the Minnesota Court of Appeals. Whether with or without hired counsel, Petitioner should be entitled to the same treatment and courtesies,

and thus have the same opportunity to present his case.

> We recognize that no law consistant with the First Amendment could limit to licensed professionals the right to petition the government for redress of grievances State v. Schwab, (Or) 600 Pzd 387, 24ALR 4th 422 (1979)

see Code of Professional Responsibility (in effect in Minnesota during these proceedings), Ethical Considerations (EC) 7-35, 36 and, especially 38. See also Minnesota Code of Judicial Conduct, Canon 3, A. (4).

U.S. Supreme Court has correctly stated:

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person

within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445, earlier case of Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 352, 38 S.Ct. 495, 62 L.Ed. 1154, 1155.

The State Courts have a duty, grounded in Constitutional requirements, to insure that pro se litigants are not impeded in their efforts to obtain justice in our courts. No more should be asked of a pro se litigant than should be asked of a licensed attorney.

Persons with claims to litigate cannot e singled out for a vastly different treatment and barred from court simply because they have failed to

satisfy an adjudicated obligation. Moses v. Hoebel, Okl. 646 P. 2d 601, 605 (1982).

The Minnesota courts erred in foreclosing Petitioner's right to proceed with discovery and to prepare for trial. The matter should be returned to the State Courts with directives:

1. To consider Petitioner's Motion under 60.02 of Minn. Rules of Civil Procedure as well as 60.01;
2. To permit Petitioner additional discovery to substantiate his claim regarding statute of limitations issues;
3. To permit Petitioner addi-

tional time, up to the time by which all discovery should be completed, to obtain suitable medical expert witnesses for those issues that require medical experts; and

4. to accord Petitioner with courteous and equal treatment, in connection with discovery matters and courtroom proceedings.

CONCLUSION

Petitioner* has done everything required of him as a responsible litigant. Respondents have done everything possible to Petitioner by procedural device, intimidation and misrepresentation. Respondents have grossly misused the Rules of Court and have disregarded standards of ethics and common decency, while driven by their obsession to crush Petitioner's claims. Through the course of these proceedings, in effectively denying Petitioner his "day in court," the Minnesota Courts have abetted Respondents.

In the interests of justice, for important public policy reasons, and for the foregoing reasons, Petitioner respectfully prays that a writ of cer-

tiorari issue to review the Order of the Minnesota Court of Appeals, filed June 4, 1986, and all related decisions and Orders.

*Petitioner has a BBA Degree, University of Minnesota, 1943; commissioned, U.S. Navy Reserve, 1943; former Commanding Officer, World War II, currently a practicing management consultant.

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED:

1. United States Constitution

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free excercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by

a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. State of Minnesota Constitution, Article 1

§4. Trial by jury

Sec. 4. The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy. A jury trial may be waived by the parties in all cases in the manner prescribed by law. The legislature may provide that the agreement of five-sixths of a jury in a civil action or proceeding, after not less than six hours' deliberation, is a sufficient verdict.

3. Minnesota Rules of Civil Procedure for District Courts

RULE 60. RELIEF FROM JUDGMENT OR ORDER

Rule 60.01. Clerical Mistakes

Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on

the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected with leave of the appellate court.

Rule 60.02. Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment (other than a divorce decree), order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons: (1) Mistake, inadvertance, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.03; (3) fraud (whether heretofore denominated intrinsic

or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceedings was entered or taken. A motion under this Rule 60.02 does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order,

or proceeding, or to grant relief to a defendant not actually personally notified as provided in Rule 4.043, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

4. Minnesota Rules of Civil Appellate Procedure, Rule 110.02

Subd. 2. Transcript Certificate. If any part of the proceedings are to be transcribed by a court reporter, a certificate as to transcript signed by the designating counsel and by the court reporter shall be filed with the clerk of the appellate courts, with a copy to

the trial court and all counsel of record within 10 days of the date the transcript was ordered. The certificate shall contain the date on which the transcript was requested; the estimated number of pages; the estimated completion date not to exceed 60 days; and a statement that satisfactory financial arrangements have been made for the transcription. Upon delivery of the transcript to the appellant, the reporter shall file with the clerk of the appellate courts a certificate evidencing the date of delivery.

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(4) A judge should accord to every person who is legaly interested in an proceeding, or his lawyer, full right to be heard according to law, and, consider ex parte or other communications con-

cerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonalbe opportunity to respond.

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EC 7-35 All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary procedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one

party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if thereis none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

EC 7-36. Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity

and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and above-board in his relations with a judge or hearing officer before whom he appears. He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

EC 7-38. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be

punctual in fulfilling all professional commitments.

APPENDIX B -- THE DECISIONS BELOW

STATE OF MINNESOTA

IN COURT OF APPEALS

C4-86-743

Robert L. Krause,

Appellant,

vs.

Mark K. Kim, M.D., d.b.a.
Mark K. Kim, M.D., P.A.,

Respondent, ORDER

Metropolitan Medical Center,

Respondent,

Lawrence A. Farber, M.D., et al.,

Respondents.

Considered and decided by Popovich, Chief J. Foley, J., and Forsberg J.

Based upon the file, records and proceedings herein, and because:

1. Appellant seeks review of a March 21 order denying his motion to set aside judgments for alleged clerical errors; and

2. Respondents move for dismissal of the appeal and for attorneys' fees, pursuant to Minn. Stat. §549.21 and Minn. R. Civ. App. P. 138; and

3. The denial of a motion to set aside a judgment for alleged clerical error is not appealable, Cin v. Cin, 372 N.W.2d 10, 12 (Minn. Ct. App. 1985), pet. for rev. denied, (Minn. Sept. 19, 1985); and

4. The underlying judgments are final and have been affirmed on appeal to this court, see Krause v. Kim, 379 N.W. 2d 93 (Minn. Ct. App. 1985), pet. for rev. denied, (Minn. Feb. 14, 1986); and

5. The trial court found appellant continues to mount frivolous attacks on the judgments and we agree this appeal from a clearly non-appealable order was not taken in good faith;

IT IS HEREBY ORDERED:

1. The appeal is dismissed.

2. Respondents' counsel are each awarded $100 as fees pursuant to Minn. Stat. §549.21, for a total award of $300.

Dated: June 3, 1986.

BY THE COURT

/s/ Peter S. Popovich
Chief Judge

STATE OF MINNESOTA

IN SUPREME COURT

C4-86-743

Robert L. Krause,

Appellant,

vs.

Mark K. Kim, M.D., d.b.a.
Mark K. Kim, M.D., P.A.,

Respondent,

Metropolitan Medical Center,

Respondent,

Lawrence A. Farber, M.D., et al.,

Respondents.

ORDER

Based upon all files, records and proceedings herein,

IT IS HEREBY ORDERED that Robert L. Krause's motion for reconsideration of the denial of the petition for further review be, and the same is, denied.

IT IS FURTHER ORDERED that respondent's motions for attorney fees be, and the same are, denied.

Dated: September 22, 1986

BY THE COURT:

/s/ Douglas K. Amdahl
Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

C4-86-743

Robert L. Krause,

Appellant,

vs.

Mark K. Kim, M.D., d.b.a.
Mark K. Kim, M.D., P.A.,

Respondent,

Metropolitan Medical Center,

Respondent,

Lawrence A. Farber, M.D., et al.,

Respondents.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the non-compliant petition for Robert L. Krause for further review be, and the same is, authorized.

IT IS FURTHER ORDERED that the petition for further review be denied.

IT IS FURTHER ORDERED that the motions of Dr. Lawrence A. Farber and Noran Neurological Clinic, P.A. and Mark K. Kim, M.D. d.b.a. Mark K. Kim, M.D., P.A. for attorney fees be, and the same are, denied.

Dated: August 20, 1986.

BY THE COURT:

/s/ Douglas K. Amdahl
Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

C4-86-743

Robert L. Krause,

Appellant,

vs.

Mark K. Kim, M.D., d.b.a.
Mark K. Kim, M.D., P.A.,

Respondent,

Metropolitan Medical Center,

Respondent,

Lawrence A. Farber, M.D., et al.,

Respondents.

ORDER

Based on all the files, records and proceedings herein,

IT IS HEREBY ORDERED that Robert L. Krause's motion to accept the late filing of the appendix to his petition

for further review be, and the same is, granted.

Dated: July 23, 1986

BY THE COURT:

/s/ Rosalie E. Wahl
Associate Justice

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

****

FILE NO. 801270

Robert L. Krause,

Plaintiff,

vs.

Lawrence A. Farber, M.D. and Noran Neurological Clinic, P.A.,

Defendants.

****

FILE NO. 785809

Robert L. Krause,

Plaintiff,

vs.

Mark K. Kim, M.D. d/b/a Mark K. Kim, M.D., P.A., and Metropolitan Medical Center, a Minnesota non-profit corporation,

Defendants.

****

The above-entitled matter came on

for hearing before the undersigned on March 20, 1986, on the Motion of plaintiff for a rehearing of the Motions argued December 27, 1984, herein and for relief from the Judgments entered herein pursuant to this Court's Order for January 21, 1985.

Plaintiff appeared pro se. Robert E. Salmon, Esq., appeared on behalf of defendants Farber and Noran Neurological Clinic. Donna J. Blazevic, Esq., appeared on behalf of defendant Kim. Keith A. Dunder, Esq., appeared on behalf of defendant Metropolitan Medical Center.

The Court has considered the Memoranda and arguments of the parties and counsel, and has reviewed the entire file. Accordingly, the Court is fully advised, and

IT IS HEREBY ORDERED that

plaintiff's Motion is in all respects denied.

Robert E. Bowen
Judge of District Court

Date: March 21, 1986.

MEMORANDUM

The Court has carefully considered all of the arguments advanced by plaintiff in support of his Motion, and finds that they are without merit. These actions have been dismissed with prejudice by this Court, and the judgments of dismissal were appealed and affirmed by the Minnesota Court of Appeals, and the Minnesota Supreme Court has declined to grant further review. Accordingly, this Court consideres these matters closed.

R.E.B.

Supreme Court, U.S.
FILED
FEB 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

86 - 1225
No. _____

In the

Supreme Court of the United States

October Term, 1986

ROBERT L. KRAUSE,

Petitioner,

vs.

MARK K. KIM, M.D. d/b/a
MARK K. KIM, M.D., P.A.
and METROPOLITAN MEDICAL CENTER, a
corporation,

LAWRENCE A. FARBER, M.D. and NORAN
NEUROLOGICAL CLINIC, P.A.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1987 — Bachman Printing, 835 Second Avenue So., Mpls., MN 55402 — (612) 339-9518

QUESTION PRESENTED FOR REVIEW

WHETHER AN ORDER DENYING VACATION OF JUDGMENT BASED SOLELY ON STATE LAW IS PROPERLY REVIEWABLE BY THIS COURT ON WRIT OF CERTIORARI?

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STATEMENT OF THE CASE

In 1982, petitioner sued Mark K. Kim, M.D., alleging medical malpractice in care rendered to him in December, 1979. Since the suit was not commenced within the time allowed by the statute of limitations, the trial court granted summary judgment in favor of respondent Dr. Kim.

On December 17, 1985, the Court of Appeals of the State of Minnesota affirmed the judgment in favor of Dr. Kim, Krause v. Kim, 379 N.W.2d 91 (Minn. Ct. App. 1985). On February 14, 1986, the Supreme Court of the State of Minnesota declined to review that decision.

Mr. Krause thereafter brought a motion before the trial court to vacate

the judgment in favor of Dr. Kim under Rule 60, Minn. R. Civ. P., on the grounds of clerical errors, mistakes, inadvertence and fraud. That motion was denied by the trial court on March 21, 1986. By order dated June 3, 1986, the Minnesota Court of Appeals, applying state law, held that the order was not appealable and that the appeal was not taken in good faith and awarded attorneys' fees. The Minnesota Supreme Court declined to review that decision on August 20, 1986, and on September 22, 1986 denied Mr. Krause's motion for reconsideration of the denial of his petition.

Petitioner now seeks review of the Minnesota Supreme Court's order dated September 22, 1986 declining to

reconsider its order denying the petition for review.

Petitioner does not seek review of the orders granting and affirming summary judgment. Nor could such a petition now be brought, due to the length of time that has passed, Rule 20, Supreme Court Rules.

SUMMARY OF ARGUMENT

The orders below were based solely on state law and are not properly reviewable by this Court on writ of certiorari.

ARGUMENT

Petitioner asserts that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(3) (See Petition for Writ of Certiorari, page

3). Since none of the other language of the statute even arguably applies here, petitioner presumably invokes the Court's jurisdiction based on the phrase, "any title, right, privilege or immunity . . . specially set up or claimed under the Constitution". However, petitioner has failed to demonstrate that a federal question was timely raised, as required by the Rule. In addition, none of the considerations governing this Court's review on certiorari even arguably apply here. Rule 17, Supreme Court Rules.

Rule 21.1(h), Supreme Court Rules, requires the petitioner to specify in his petition for certiorari

> "the stage in the proceedings, both in the court of first instance and the Appellate Court, at which the federal questions sought to be

> reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

The petition is utterly silent on this subject. in fact, no federal question was ever raised to the trial court or on appeal. Since no federal question was raised, this Court has no jurisdiction to entertain an appeal, and the petition should be denied. Webb v. Webb, 451 U.S. 493 (1981).

The decision that petitioner seeks to have reviewed was decided solely on

the basis of state law: specifically, Rule 60, Minn. R. Civ. P. and the state court decisions interpreting that rule. Since the decision rests on a matter of state law, there is simply no basis for review by this Court. Herb v. Pitcairn, 324 U.S. 117, 125 (1954).

The order for summary judgment and affirmance of that order are not before this Court on review. However, even if petitioner had sought timely review of those orders, he would not be able to establish that a federal question was properly and timely raised at the trial level. Nor would he be successful on the merits. The thrust of petitioner's frustration is directed at the fact that he was precluded by application of Rule

56, Minn. R. Civ. P., from presenting his case to a jury. His petition for certiorari belatedly attempts to raise the constitutionality of the summary judgment procedure. Even if this issue were properly before this Court, petitioner's challenge would not be successful. The constitutionality of the summary judgment procedure was upheld by this Court long ago. See, e.g., Fidelity & Deposit Co. of Maryland v. United States, 187 U.S. 315 (1902).

CONCLUSION

No federal question was raised in or ruled on by the trial court. The decision complained of rests solely on a matter of state law. The constitutionality of the summary judgment procedure which underlies

petitioner's complaints here has already been established. The Petition should therefore be denied.

BASSFORD, HECKT, LOCKHART
& MULLIN, P.A.

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FILED
FEB 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1225

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Robert L. Krause,

Petitioner,

v.

Mark K. Kim, M.D., d/b/a Mark K. Kim, M.D., P.A., Metropolitan Medical Center, a corporation, Lawrence A. Farber, M.D. and Noran Neurological Clinic, P.A.,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS DR. FARBER AND NORAN CLINIC TO PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

J. Richard Bland
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QUESTION PRESENTED

Where petitioner, a pro se litigant in a medical malpractice case whose claim was previously dismissed under the state statute of limitations and was affirmed on appeal to the Minnesota Appellate Courts, thereafter filed a motion to vacate under the Minnesota Rules of Civil Procedure which fails to present any federal question to the state appellate courts, which is decided adversely to his position upon independent and adequate state grounds and which is grounded upon an underlying claim which is non-actionable as a matter of law, should his petition for a writ of certiorari properly be denied?

The Court should hold: In the Affirmative.

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IN THE

Supreme Court of the United States

No. 86-1225

OCTOBER TERM, 1986

Robert L. Krause,

Petitioner,

v.

Mark K. Kim, M.D., d/b/a Mark K. Kim, M.D., P.A., Metropolitan Medical Center, a corporation, Lawrence A. Farber, M.D. and Noran Neurological Clinic, P.A.,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENTS DR. FARBER AND NORAN CLINIC TO PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

STATEMENT OF THE CASE

Petitioner Robert Krause commenced this action for medical malpractice against respondents Dr. Lawrence Farber and Noran Neurological Clinic in state court by service of a Summons and Complaint on November 8, 1982. At about the same time, plaintiff commenced a related action against respondents Dr. Kim and Metropolitan Medical Center. Dr. Farber, a neurologist who practices at Noran Neurological Clinic, commenced treat-

ing plaintiff in 1978 following a car accident. The records established that the last date of plaintiff's treatment by Dr. Farber was on July 10, 1980, as confirmed by plaintiff's deposition and the medical records.

Respondents Dr. Farber and Noran Clinic moved for summary judgment of dismissal under the two year statute of limitations for medical malpractice, Minn. Stat. §541.07, alleging that the claim was time-barred, as it was not commenced on or before July 11, 1980. By order dated January 21, 1985, the Honorable Robert Bowen, Hennepin County District Court, State of Minnesota, dismissed the claims against Dr. Farber, Noran Clinic and others under the statute of limitations. (Petitioner does not claim that the trial court failed to accept, at the time of that hearing, any documents that are at all relevant to his claim against Dr. Farber and the Noran Clinic.) Judgment was entered on February 27, 1985, from which plaintiff appealed. As the summary judgment motion had not been transcribed, the record was supplemented pursuant to Rule 110.03 of the Minnesota Rules of Civil Appellate Procedure, in the form of a statement of the record that was approved by the trial court.

The Minnesota Court of Appeals affirmed the dismissal of the claims against Dr. Farber and Noran Clinic. 379 N.W.2d 93 (Minn.Ct.App. 1985). Further review was denied by the Minnesota Supreme Court. *Id.* The appeal in the companion case was also dismissed and further review was denied. 379 N.W.2d 91 (Minn.Ct.App. 1985) *pet. for rev. den.*

Petitioner also filed a motion to vacate the trial court's order of January 21, 1985, and the resulting judgment of dismissal entered February 27, 1985. The denial of that

motion precipitated the instant certiorari petition. Petitioner sought to vacate the original order and underlying judgment, citing Rule 60 of the Minnesota Rules of Civil Procedure, governing the vacation of orders and judgments. Petitioner alleged that the underlying order and judgment should be vacated due to clerical error and misrepresentation.

At the hearing before Judge Bowen on March 20, 1986, plaintiff was given a full and fair opportunity to argue his motion for over one hour. He presented only issues that had previously been argued and briefed to the trial court and the Minnesota appellate courts, such as that the trial court should have initially granted a continuance on the summary judgment motions and that the trial court should have allowed the filing of several additional exhibits, none of which pertained to the claims against Dr. Farber and the Noran Clinic. No new grounds for further relief were presented. Petitioner's moving papers made passing reference to several constitutional provisions, although it was unclear as to whether petitioner was referring to the Minnesota or to the federal Constitution. The trial court denied petitioner's motion to vacate the dismissal as to all defendants by order filed March 21, 1986.

Plaintiff thereafter filed a notice of appeal as to all parties but did not present his constitutional claims to the Minnesota appellate courts. On June 3, 1986, on respondents' motions to dismiss, the Minnesota Court of Appeals dismissed petitioner's second appeal as being taken from a non-appealable order. The Court of Appeals' order granting the motion to dismiss did not rely on any federal constitutional grounds, but rather, rested

solely upon the Minnesota Rules of Civil Procedure and the Minnesota Rules of Civil Appellate Procedure and cases construing the rules. The Minnesota Supreme Court declined to grant further review and also denied petitioner's motion for a rehearing. No federal questions were addressed. Petitioner now seeks relief from this Court.

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari should be denied for several separate and independent reasons: First, the Court lacks jurisdiction pursuant to 28 U.S.C. §1257(3) because petitioner did not present any federal question to the Minnesota trial court or to the Minnesota appellate courts; second, the Court lacks jurisdiction because the decisions below rest upon adequate and independent state grounds; and third, the decisions below are of limited significance and application and were, in any event, correctly decided under controlling state law.

Petitioner alleges that jurisdiction is conferred under 28 U.S.C. §1257(3). Nevertheless, it is well settled that the jurisdiction of this Court to reexamine a final judgment of a state court can arise only if the record as a whole shows, either expressly or by clear implication, that the federal claim was adequately presented throughout the state court system. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184 (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 17 S.Ct. 709, 41 L.Ed. 1149 (1897). If the federal question was presented to the lower state courts but not properly preserved on appeal to higher state courts, the requirement that the issue be presented to the highest state court has not been satisfied. *Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S. 541, 68 S.Ct. 682, 92 L.Ed.

863 (1948). Thus, while petitioner at least mentioned several constitutional grounds to the lower court, there is no evidence—either of record or outside of the record —to show that any federal question was presented to the Minnesota Supreme Court. Petitioner has failed to satisfy the threshhold jurisdictional requirement and his petition for writ of certiorari must be denied.

The petition should be denied for a second and additional basis: The decision rests upon adequate and independent state grounds. The Supreme Court has no power to revise or review judgments of state courts on questions of state law. *Henry v. State of Mississippi*, 379 U.S. 443, 85 S.Ct. 546, — L.Ed.2d — (1965). The doctrine that the Supreme Court will decline to review state court judgments which rest on independent and adequate state grounds is necessary to avoid the issuance of advisory opinions. *Id.* Further, federal courts lack authority to function as an appellate arm of state courts. *Pilkinton v. Pilkinton*, 389 F.2d 32 (8th Cir.) *cert. den.* 392 U.S. 906, 88 S.Ct. 2057, 20 L.Ed.2d 1364 (1968). Petitioner's initial complaint is with the procedure employed by the trial court to rule on his motion to vacate under Rule 60 of the Minnesota Rules of Civil Procedure. The Minnesota Rules, including Rule 60, are patterned after the Federal Rules of Civil Procedure, and the Minnesota Rules governing civil procedure have been upheld as constitutional and not in violation of federal rights. *Solum v. Farmers and Merchants Nat. Bank*, 269 Minn. 431, 131 N.W.2d 231 (1964). It is equally clear that petitioner's complaints about Rule 56 of the Minnesota Rules of Civil Procedure, governing summary judgment, regarding the Minnesota Rules of Civil Appellate Procedure

and regarding the two year statute of limitations for medical malpractice do not present federal questions, so that the decision below is sustainable on adequate and independent state court grounds.

Even if the propriety of the trial court's initial granting of summary judgment was reviewable by this Court, there can be no dispute that petitioner was not denied his right to a jury trial or any other federal rights. In *Fidelity and Deposit Co. v. United States,* 187 U.S. 315, 23 S.Ct. 120, 47 L.Ed. 194 (1902), this Court upheld as constitutional the summary granting of a judgment upon motion:

> If it were true that the rule deprived the plaintiff in error of the right of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands.

187 U.S. at 320, 23 S.Ct. at 122. Similarly, the Court has recently reaffirmed the continuing viability of summary judgment under the Federal Rules of Civil Procedure. *See Celotex Corp. v. Catrett,* — U.S. —, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.,* — U.S. —, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Matsushita Elec. Co. v. Zenith Radio Corp.,* 475 U.S. —, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In summary, the decision below is sustainable on adequate and independent state grounds and was correct as a matter of law. No federal question was presented to the Minnesota appellate courts.

CONCLUSION

For the foregoing reasons, respondents Dr. Lawrence Farber and Noran Neurological Clinic respectfully request that the Court deny the petition for writ of certiorari.

DATED. February 16, 1987.

Respectfully submitted,

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86 - 1225

Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 1986

ROBERT L. KRAUSE,

Petitioner,

vs.

MARK K. KIM, M.D. d/b/a
MARK K. KIM, M.D., P.A.
and METROPOLITAN MEDICAL CENTER, a
corporation,

LAWRENCE A. FARBER, M.D. and NORAN
NEUROLOGICAL CLINIC, P.A.,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT METROPOLITAN MEDICAL CENTER TO PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

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QUESTION PRESENTED

Where petitioner, whose claim was previously dismissed with prejudice for failure to comply with a discovery order, thereafter filed an untimely appeal of the dismissal to the Minnesota Appellate Courts, which appeal was dismissed as untimely; and where petitioner thereafter brought a motion in the trial court to vacate the trial court's dismissal pursuant to the Minnesota Rules of Civil Procedure, which motion was denied upon independent and adequate state grounds; and where the petitioner thereafter petitioned the Supreme Court of Minnesota for rehearing, which petition was denied on state grounds, should his petition for a Writ of Certiorari properly be denied?

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No. 86-1225

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

Robert L. Krause,

Petitioner,

vs.

Mark K. Kim, M.D., d/b/a Mark K. Kim, M.D., P.A.,Metropolitan Medical Center, a corporation, Lawrence A. Farber, M.D. and Noran Neurological Clinic, P.A.

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT METROPOLITAN MEDICAL CENTER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Plaintiff, Robert Krause, brought

the above action against Metropolitan Medical Center on December 23, 1981, claiming damages for this defendant's alleged negligence in December of 1979. Approximately five years later, this defendant brought a motion to compel answers to interrogatories pertaining to experts and on January 21, 1985, the trial court (Hennepin County District Court) ordered that plaintiff's complaint would be dismissed with prejudice in the event that he failed to answer the interrogatories propounded within twenty (20) days of the date of said order.

Krause did not comply with the court's order in that, first, he did not respond to the interrogatories within the twenty-day period ordered by the court, and second, the untimely response notwithstanding, Krause later did

"respond," but in a manner ruled by the trial court to be incomplete and non-responsive. Under Minnesota Rules of Civil Procedure 37.01(3), such an incomplete response is deemed to be a failure to answer. Accordingly, on February 28, 1985 defendant Metropolitan Medical Center filed a motion to dismiss for failure to comply with the previous court order concerning discovery and filed a supporting affidavit therewith, attaching plaintiff's "response" to the discovery order. Thereafter, on May 14, 1985, the trial court entered its order dismissing plaintiff's complaint against defendant Metropolitan Medical Center, with prejudice. (See Appendix A)

The plaintiff then appealed the trial court's dismissal of his complaint against Metropolitan Medical Center to the Minnesota Court of Appeals on

October 24, 1985. This appeal was untimely, as it was filed more than 90 days after the entry of judgment against plaintiff, in contravention of Rule 104.01 of the Minnesota Rules of Civil Procedure. Accordingly, the Minnesota Court of Appeals entered its order on November 19, 1985 dismissing Mr. Krause's appeal out of hand, as untimely. (See Appendix B)

Plaintiff then brought a motion before the trial court which had originally heard his case seeking to vacate the judgment of dismissal entered in favor of defendant Metropolitan Medical Center and attempting to re-argue matters which had previously been submitted to the trial court and had subsequently been appealed to the Minnesota Court of Appeals. On March 20, 1986, the trial court, upon

reviewing the entire file, denied plaintiff's motion for rehearing. (See Appendix C)

Thereafter, the plaintiff appealed to the Minnesota Supreme Court pursuant to Rule 140 of the Minnesota Rules of Appellate Procedure requesting reconsideration of the denial of further review. On September 22, 1986, the Supreme Court of the State of Minnesota declined to grant further review, and also denied petitioner's motion for a rehearing. No federal questions were addressed. Petitioner now seeks relief from this Court.

SUMMARY OF ARGUMENT

The orders below are not properly reviewable by this Honorable Court on Writ of Certiorari, as they rest on independent and adequate state grounds and are based solely upon issues of

state law. Additionally, no federal question has been properly raised by petitioner, and the issues involved are not sufficiently important to warrant this Court's attention.

ARGUMENT

Petitioner attempts to involve this Court's jurisdiction pursuant to 28 U.S.C. §1257(3). The phrase "Any title, right, privilege or immunity ... especially set up or claimed under the Constitution" appears to be the portion of the statute petitioner looks to in an attempt to come within the purview of 28 U.S.C. §1257(3).

Petitioner has not, however, raised <u>any</u> federal question to the trial court or in the Minnesota Appellate process, and, even if he had, has failed to appropriately specify how he has done so in his Petition for Certiorari herein.

Rule 21.1(h), Supreme Court Rules, mandates that petitioner specify with particularity in his Petition for Certiorari

> "the stage in the proceedings, both in the court of first instance and the Appellate Court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

The United States Supreme Court jurisdiction will not arise unless a federal question has been adequately raised and preserved at the state court level. Webb v. Webb, 451 U.S. 493; 101 S.Ct. 1889 (1981). Accordingly, since no federal question was, in fact, raised

to the trial court or on appeal, and since no federal question has been set forth in petitioner's Petition for Certiorari which remotely complies with Rule 21.1(h), Supreme Court Rules, this Honorable Court does not have jurisdiction to hear this appeal and the petition should be denied. Id.

The petition and the issues sought to be raised therein are not entirely clear to this respondent. What is clear, is that any decision for which petitioner could possibly be seeking review was decided on independent and adequate state grounds and solely on the basis of state law. Since each and every decision of the courts below rests on a matter of state law, no basis can be found for review by this court. Herb v. Pitcairn, 324 U.S. 117, 125 (1954). In either event, no basis for review by

this court has been set forth in the petition.

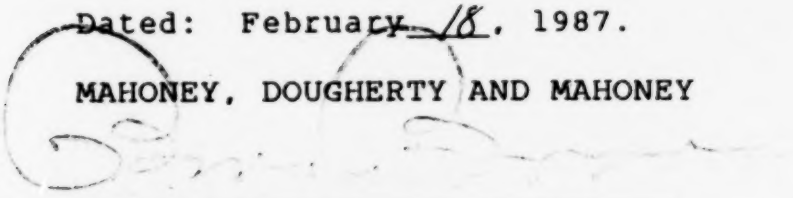
CONCLUSION

Whatever decisions below petitioner complains of are matters of state civil procedure resting solely on state law. No federal question has been raised or ruled upon by any court below, and no federal question has been properly set forth in the petition as required by Rule 21.1(h), Supreme Court Rules. This court lacks jurisdiction over this matter pursuant to 28 U.S.C. §1257(3).

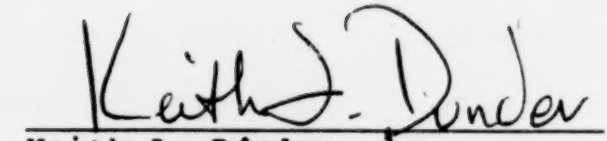
For the foregoing reasons, respondent Metropolitan Medical Center, respectfully requests that the Court deny the petition for Writ of Certiorari.

Dated: February 18, 1987.

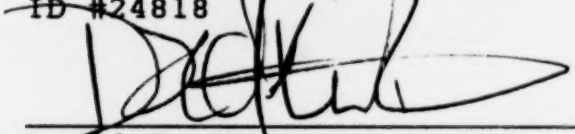
MAHONEY, DOUGHERTY AND MAHONEY



Richard P. Mahoney
ID #6662X (MINN.)



Keith A. Dunder
ID #24818



David E. Kuntz
ID #133152
Attorneys for Respondent
Metropolitan Medical Center
801 Park Avenue
Minneapolis, Minnesota 55404
612/339-5863

BEST AVA

APPENDIX A

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Robert L. Krause, File No. 801270

Plaintiff,

-vs- ORDER

Mark K. Kim, M.D., d.b.a Mark K. Kim, M.D., P.A., and Metropolitan Medical Center, a Minnesota non-profit corporation,

Defendants.

On January 21, 1985, the undersigned ordered that plaintiff's Complaint would be dismissed with prejudice if he failed to answer the expert interrogatories of defendant Metropolitan Medical Center within 20 days. Counsel for Metropolitan Medical Center has submitted an Affidavit attesting to the fact that its expert interrogatories

ILABLE COPY

have not been properly answered and that no medical witness has been identified by the plaintiff.

THEREFORE, IT IS HEREBY ORDERED that the plaintiff's Complaint against Metropolitan Medical Center is hereby dismissed with prejudice and that judgment be entered in favor of Defendant Metropolitan Medical Center and against plaintiff, dismissing plaintiff's Complaint with prejudice and with costs.

BY THE COURT:

/s/ Robert E. Bowen
Judge of District Court

Dated: May 14, 1985.

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX B

STATE OF MINNESOTA

IN COURT OF APPEALS

#CO-85-1992

Robert L. Krause,

Appellant,

vs. O R D E R

Mark K. Kim, M.D., d.b.a.
Mark K. Kim, M.D., P.A.,

Defendant,

Metropolitan Medical Center,

Respondent.

Considered and decided by Popovich, Chief J., Randall, J. and Crippen, J.

Based upon the file, records and proceedings herein, and because:

1. Appellant brought a medical malpractice suit in 1981 but failed to identify an expert witness; and

2. In January 1985 the trial court ordered appellant to identify a witness

under pain of dismissal; and

3. Appellant seeks review of the resulting July 25, 1985 judgment of dismissal; and

4. Appeal from a judgment must be taken within 90 days after entry of judgment, Minn. R. Civ. App. P. 104.01; and

5. This appeal was filed and served on October 24, the 91st day from entry of the judgment; and

6. Respondent moves to dismiss the appeal as untimely taken; and

7. This court may not extend the time for filing of a notice of appeal, Minn. R. Civ. App. P. 126.02; and

8. Respondent's reply affidavit, which was not signed, but was notarized, was disregarded by this court in consideration of the motion;

IT IS HEREBY ORDERED the appeal is dismissed.

Dated: 11/19/85

BY THE COURT

/s/
Chief Judge

CLL:mbs

APPENDIX C

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Robert L. Krause, File No. 801270

Plaintiff,

-vs-

Lawrence A. Farber, M.D. and Noran Neurological Clinic, P.A.,

Defendants.

Robert L. Krause, File No. 785809

Plaintiff,

-vs-

Mark K. Kim, M.D., d/b/a Mark K. Kim, M.D., P.A., and Metropolitan Medical Center, a Minnesota non-profit corporation,

Defendants.

The above-entitled matter came on

for hearing before the undersigned on March 20, 1986, on the Motion of plaintiff for a rehearing of the Motions argued December 27, 1984, herein and for relief from the Judgments entered herein pursuant to this Court's Order of January 21, 1985.

Plaintiff appeared pro se. Robert E. Salmon, Esq., appeared on behalf of defendants Farber and Noran Neurological Clinic. Donna J. Blazevic, Esq. appeared on behalf of defendant Kim. Keith A. Dunder, Esq., appeared on behalf of defendant Metropolitan Medical Center.

The Court has considered the Memoranda and arguments of the parties and counsel, and has reviewed the entire file. Accordingly, the Court is fully advised, and

IT IS HEREBY ORDERED that plaintiff's Motion is in all respects denied.

/s/ Robert E. Bowen
Robert E. Bowen
Judge of District Court

DATE: March 21, 1986.

MEMORANDUM

The Court has carefully considered all of the arguments advanced by plaintiff in support of his Motion, and finds that they are without merit. These actions have been dismissed with prejudice by this Court, and the judgments of dismissal were appealed and affirmed by the Minnesota Court of Appeals, and the Minnesota Supreme Court has declined to grant further review. Accordingly, this Court considers these matters closed.

Robert E. Bowen

APPENDIX D

STATE OF MINNESOTA

IN SUPREME COURT

C4-86-743

Robert L. Krause,

Appellant,

-vs-

Mark K. Kim, M.D.,
d.b.a. Mark K. Kim,
M.D., P.A.,

Respondent,

Metropolitan Medical
Center,

Respondent,

Lawrence A. Farber,
M.D., et al,

Respondents.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that Robert L. Krause's motion for reconsideration of the denial of the petition for further

review be, and the same is, denied.

IT IS FURTHER ORDERED that respondents' motions for attorney fees be, and the same are, denied.

Dated: September 22, 1986.

BY THE COURT:

_____

Chief Justice

Supreme Court, U.S.
FILED
MAR 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1225

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ROBERT L. KRAUSE,

Petitioner,

v.

MARK K. KIM, M.D. d/b/a)
MARK K. KIM, M.D., P.A.)
and METROPOLITAN MEDICAL)
CENTER, a Corporation)
)
LAWRENCE A. FARBER, M.D.)
and NORAN NEUROLOGICAL)
CLINIC, P.A.),

Respondents.

PETITIONER'S REPLY MEMORANDUM

Robert L. Krause
Attorney Pro Se
8131 Westwood Hills Drive
St. Louis Park, MN 55426
(612) 545-3931

TABLE OF CASES

McKaskle v. Vela, 464 U.S. 1053, 104 S.Ct. 736, 79 L.Ed. 2d 195 (1984).

Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889, 68 L.Ed. 2d 392 (1981).

The thrust of each Respondent's Brief in Opposition is the claim that Petitioner failed to raise the federal issues in the state courts, and that the decisions of the state courts were decided upon independent and adequate state grounds. The Respondents are mistaken.

Petitioner brought a timely Motion before the District Court for relief from judgments based on Rules 60.01 and 60.02 of the Minnesota Rules of Civil Procedure for District Courts. Petitioner's moving papers explicitly referred to federal constitutional provisions (e.g., that relief should be granted "...in the Interest of Justice, Upon Consideration of Due Process, Equal Protection, and Fundamental Fairness"). Petitioner emphasized, in oral arguments before the District Court, the

Constitutional issues, including the denial of jury trial. These issues were of central importance on appeal.

Petitioner's Statement of the Case to the Minnesota Court of Appeals specifically stated, at p. 2, that Petitioner would raise as issues on appeal the denial of equal access and due process. Before the merits could be heard, Respondents moved to dismiss the Appeal. Petitioner's constitutional issues were implicit in his replies to the Motion to Dismiss responses.

It is true that the Minnesota Court of Appeals, in its decision affirming the District Court's denial of Petitioner's motion, did not address Petitioner's federal (constitutional) issues. That Court also failed to address the 60.02 aspect of petitioner's

motion and appeal and mischaracterized the motion as being based (solely) on clerical error.

The Court of Appeals ignored entirely Petitioner's arguments based on mistake, misrepresentation and the other grounds permitting relief under Rule 60.02, and similarly ignored the constitutional issues.

The totality of the record in the courts of Minnesota demonstrates that federal constitutional issues under the First, Seventh and Fourteenth Amendments of the U.S. Constitution were consistently before the Court, even prior to the raising of the Rule 60 Motion by Petitioner. The lack of transcripts for the initial crucial hearing before the trial court on December 27, 1984, and for the hearing on the Rule 60 Motion occurred despite Petitioner's efforts,

and the lack of a proper record caused by the lack of those transcripts should not bar Petitioner's request for review.

The record as a whole shows that the federal issues were raised below.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. New York ex rel. Bryant V. Zimmerman, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928); Oxley Stave Co. v. Butler County, 166 U.S. 648, 655, 17 S.Ct. 709, 711, 41 L.Ed. 1149 (1897).

Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed. 2d 392 (1981), at

496.

Accordingly, review of the decisions below is appropriate. This is true even if all arguments raised on Petition for Certiorari were not explicitly dealt with by the state courts. McKaskle v. Vela, 464 U.S. 1053, 104 S.Ct. 736, 79 L.Ed. 2d 195, (1984).

The next and related issue is whether or not the court below decided adversely to Petitioner on independent and adequate state grounds. Clearly they did not. The Court of Appeals ignored the 60.02 aspect of Petitioner's Motion as well as they ignored the constitutional infirmities of the prior proceedings. The cumulative effect of the disparate treatment of Petitioner and of the violation of his constitutional rights, colored the entire pro-

ceedings and made it impossible for a decision of the merits to occur.

Petitioner has been erroneously characterized as arguing the constitutionality of the Summary Judgment rule. He has not made that argument. There are instances where summary judgment is appropriate. Petitioner is arguing that in Petitioner's particular cases summary judgment was inappropriate, and the granting of summary judgment (1) before discovery was completed, (2) ignoring the operative dates for statute of limitation purposes which differed from the last dates Petitioner visited the Respondent Doctors, and (3) based on the unilateral affidavit of a Respondent's attorney, was unconstitutional as violative of Petitioner's 1st, 7th and 14th amendment rights.

As discussed above, Petitioner did present federal questions to the Minnesota Appellate Courts, and the allegations to the contrary in each of the Respondent's briefs is wrong. The decision of the court of appeals was based on the mistaken belief Petitioner's motion in the District Court, was based solely on clerical error (Rule 60.01). The independent and adequate state ground for ruling against Petitioner would have been present if the Motion had been based solely on clerical error. It was not. The appellate court's ruling based only on that criteria was not adequate. In fact, by ignoring Petitioner's 60.02 arguments and supporting documents, the state courts further violated Petitioner's due process/equal protection rights.

Petitioner disputes not only the legal conclusions set forth in the Respondent's Briefs in Opposition, but also points out that there are mistatements by Respondents in allegations of fact. For example, the Brief of Respondents Farber, et al., is wrong in claiming (at p. 2) "Petitioner does not claim that the trial court failed to accept, at the time of (Dec. 27, 1984) hearing, any documents that are at all relevant to his claim against Dr. Farber and the Noran Clinic".

Petitioner, as a pro se litigant, is entitled to recieve his "day in court". The rights of pro se litigants--prisoners, the poor, and those who choose to proceed as their own counsel--are at stake. Petitioner is aggrived because the disparate treatment* he received resulted in the dismissal of his

lawsuits and resulted in the disregard of his proper Motion for post-judgment relief under Rule 60.01 and 60.02, Minn. Rules of Civil Procedure. The U.S. Supreme Court can, by granting this Petition for Writ of Certiorari, give light to this Petitioner, and hope to all pro se litigants that a just and proper claim by any litigant can and will get serious and impartial consideration by the Court, in keeping with the ethical standards of the judiciary and in line with the basic principles of the United States Constitution.

*See Appendix annexed hereto giving examples of disparate treatment to Petitioner and the extreme delaying tactic of Respondents.

APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

STATE OF MINNESOTA
DISTRICT COURT OF MINNESOTA
FOURTH JUDICIAL DISTRICT

CHAMBERS OF
JUDGE ROBERT E. BOWEN
COURTS TOWER
GOVERNMENT CENTER
MINNEAPOLIS, MINN 55487

June 21, 1985

Clerk of Appellate Courts
230 State Capitol Building
St. Paul, Minnesota 55155

RE: Court of Appeals File Nos. C6-85-989, C2-85-990 Robert L. Krause v. Mark K. Kim, et al, Robert L. Krause v. Lawrence A. Farber, et al

Dear Sir:

I have had forwarded to me by attorney Thoelke, who is representing the appellant in the above-entitled matter copies of appellant's statement of the proceedings in each of the above-named cases.

I have declined to approve either of the appellant's proposed statements and have instead approved the objections in your file C6-85-989 and the respondents' statement of the proceedings in your file C2-85-990.

These matters were decided on motions for summary judgment, and therefore the basis for the decision in each case is, as it must be, in the file.

Yours very truly,

Robert E. Bowen

REB/jhr
cc: David Thoelke
Rebecca Moos
Robert Salmon

April 5, 1982

Keith A. Dunder
Mahoney, Dougherty and Mahoney
801 Park Avenue
Minneapolis, MN. 55404

Re: Mark A. Kim, M.D. and
Metropolitan Medical Center

Dear Mr. Dunder:

I am writing to you in regard to your letter of March 26, 1982. I wish to clarify your interpretation of our telephone conversation and the purpose of my call as follows:

1) I did not state I wished to proceed on a generally informal basis than that of normal discovery proceedings.

2) You did not inform me that you may be willing to proceed on a more informal basis in certain areas if it would result in substantial savings in time and expense.

3) I did not inform you that I believed I had gathered all the facts pertinent to my claim.

The purpose of my call and what I <u>did</u> say are as follows:

1) I called to inform you I had received the interrogatories.

2) The purpose of the call was to:

   a. Present the possibility to review certain records and documents that we could <u>mutually</u> agree upon during the discovery process. Those records and documents so agreed to be reviewed at a convenient time and <u>mutually</u> agreed upon.

   b. Possible additional records and documents relevant to the subject matter of the action, again mutually agreed upon, could be produced at another date and time convenient to both.

   c. Any records and documents requested to be produced by either that possibly would be disputed, hopefully none, would at least be specifically identified and then ruled on by the court.

d. Acknowledgement under oath by both consistent with normal discovery proceedings.

e. Depositions scheduled by mutual agreement.

f. Identify and narrow the issues by a conference.

3. I did state that I had my medical records from the Metropolitan Medical Center with the exception of a brain scan and report that were destroyed. These are available to me without legal action by 1977 Minnesota Statutes 144.33 - access to health records before filing this action.

I tried to make it clear exactly how I wished to proceed, but you were not receptive to any suggestions - I surmise because of my filing this action pro se.

Your statement in your letter,

> " you also informed me that you believed you have all the facts pertinent to your claim, which you have been gathering by personally investigating the matter by interviewing staff personnel at Metropolitan Medical Center".

is obviously incorrect. I will respond by asking you a question. If I had all the facts I need, why would I be calling you in the first place? I will now start my discovery process.

My contacts with the Metropolitan Medical Center personnel was entirely limited to anything relating to my health records, in and out patient, and in the Dr. Kim Pain Clinic. If you have any information to the contrary please write to me.

Your statement,

> "In light of your ongoing investigation, and the confusion which is bound to result because you are representing yourself in this matter, I suggest that it may be easier in the long run to proceed with the discovery on a formal basis".

now after receiving your letter, additional interrogatories, I will agree. It will be substantially more expensive for your client and to a lesser degree for myself. Anyway, I tried.

I will timely answer your interrogatories. I am sorry you said you are not willing to extend normal attorney courtesies to me as attorney pro se. I, therefore, will not extend them to you. Please make all contacts with me by letter or memo. More expense results to your client, but less for me under the circumstances.

I am a management consultant with thirty-five years of experience in business including numerous medical and legal practices. Substantial savings of time and money were obvious. I have now concluded that I will benefit by the posture you have taken. For your information, it is better for me because I will now be very formal, but will arrange everything to fit my convenience. I will not have difficulty adjusting to your demands. If I find it impossible to meet your demands I will seek relief in court.

I will proceed with this case immediately with the assistance of a consulting attorney. I will proceed in a very polite efficient manner. My hope is that you will act likewise in the future. You can assume I will continue to proceed according to the Minnesota Rules of Court. If you have any complaints please write to me and I will respond accordingly.

I wish to go on record that all the personnel of the Metropolitan Medical Center on each and every occasion, whether in person or on the telephone, have been polite, pleasant and efficient. I wish to compliment the hospital accordingly. The responsibility for the problems in this case can now unfold in the discovery process. I am sorry I was forced to take this action.

I am enclosing a copy of this letter to Mark G. Mishek, Director of Legal Services and to Frank Larkin, Executive Vice-President of Operations of the Metropolitan Medical Center for their information. All subsequent contact will be directed only to you.

Yours very truly,

Robert L. Krause
Attorney Pro se
8131 Westwood Hills Drive
St. Louis Park, MN. 55426
612-545-3931

cc: Mark G. Mishek
Director of Legal Services
Metropolitan Medical Center
900 South Eighth Street
Minneapolis, MN. 55404

cc: Frank Larkin
Executive Vice-President of Operations
Metropolitan Medical Center
900 South Eighth Street
Minneapolis, MN. 55404

State of Minnesota,

County of Hennepin

DISTRICT COURT

Fourth Judicial District

Robert L. Krause,

Plaintiff

vs.

Mark K. Kim, M. D. d/b/a Mark K. Kim, M. D. P. A. and Metropolitan Medical Center, a Minnesota Non-Profit Corp.

Defendants

Notice of Taking Deposition

FILE NO.

TO: Defendant Metropolitan Medical Center and its attorney, Keith A. Dunder, 801 Park Avenue, Minneapolis, MN 55404

PLEASE TAKE NOTICE, That the deposition of Frank Larkin, Executive Vice-President of Operations, Metropolitan Medical Center, Minneapolis, Minnesota, by oral examination will be taken before MARY ELLEN SPOTTS or any qualified notary public at Room 1251, Hennepin County Government Center in the City of Minneapolis in the County of Hennepin, State of Minnesota, on the 4th day of June 1982 at 9 o'clock A. M., and thereafter by adjournment until the same shall be completed.

April 30th, 1982

Attached hereto and made a part hereof is Plaintiff's Request for Production of Documents and Objects.

MARY ELLEN SPOTTS
Registered Professional Reporter
304 9th S.E.
Minneapolis, Minnesota 55414
Phone: 378-9047

By
Robert L. Krause, Plaintiff
Attorney and as
8131 Westwood Hills Drive
St. Louis Park, MN

Speed Messag.

To MR KEITH DUNDAS
MAHONEY, DOUGHERTY & MULLIN
431 PARK AVE
MINNEAPOLIS, MN. 55404

From Robert L Krause
8131 WESTWOOD HILLS DR
ST. LOUIS PK, MN 55426

Subject KRAUSE V. METROPOLITAN MEDICAL CENTER

Date 5-14 1982

THIS IS IN REPLY TO YOUR REQUEST FOR A CONTINUANCE OF THE ARVIN DEPOSITION SCHEDULED FOR JUNE 4, 1982.

IT APPEARS TO ME THAT YOU ARE CONSCIOUSLY AVOIDING COMPLIANCE WITH MY REASONABLE DISCOVERY REQUEST. IN VIEW OF YOUR CONDUCT (e.g. THAT YOU PREDICT 3 WEEKS PRIOR TO THE DUE DATE, THAT YOU WILL NOT PRODUCE THE REQUESTED DOCUMENTS), I CANNOT ACCEDE TO THE REQUESTED CONTINUANCE. DISCOVERY MUST GO FORWARD IN THIS CASE, DESPITE YOUR EFFORTS TO DELAY.

I WILL BE SENDING YOU A NEXT WEEK MY SUPPLEMENTAL [illegible] AND RESPONSES TO YOUR LETTER DATED MAY 6, 1982.

I LOOK FORWARD TO SEEING YOU ON JUNE 4, 1982.

cc: REBECCA EGGE MAAS

Signed Robert L Krause

Wilson Jones

MAHONEY, DOUGHERTY AND MAHONEY
PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS
801 PARK AVENUE
MINNEAPOLIS, MINNESOTA 55404-1109
(612) 339-9063

OF COUNSEL
VERNON J. SCHMIDLIN

G. P. MAHONEY (1910-1983)
G. J. MAHONEY (1923-1987)

RICHARD P. MAHONEY
THOMAS E. DOUGHERTY
JAMES M. MAHONEY
KENNETH GLASGOW
DALE B. LINDMAN
GARY C. BISTRO
RAYMOND M. HOLD
PATRICK J. BISTRO

KEITH A. DUNDER
SANDRA J. GILBRANDS
PATRICK E. MAHONEY

January 2, 1985

Mr. Robert L. Krause
8131 Westwood Hills Drive
St. Louis Park, Minnesota 55426

Re: Robert L. Krause v.
Metropolitan Medical Center
Our File No. 80-2010

Dear Mr. Krause:

This will confirm our conversations of December 21 and 26 in which you indicated your desire to take the deposition of Mr. Frank Larkin, the Chief Executive Officer at Metropolitan Medical Center. As I advised, I fail to see what relevant information or evidence would be gained from such a deposition. We do not intend to produce Mr. Larkin for a deposition unless you can make some reasonable showing that there is relevant evidence or information to be gained by it, and we will therefore move to quash any scheduled deposition of Mr. Larkin.

Very truly yours,

MAHONEY, DOUGHERTY and MAHONEY

Keith A. Dunder

KAD:joo

cc: Rebecca Moos
Mark Peterson

EXHIBIT A

STATE OF MINNESOTA

COUNTY OF HENNEPIN

FILED

'85 JAN 25 AM 11:57

BY HENN. CO. DISTRICT COURT ADMINISTRATOR

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Robert L. Krause,

Plaintiff,

vs.

FILE NO. 801270

ORDER

Lawrence A. Farber, M.D., and Noran Neurological Clinic, P.A.,

Defendants.

Robert L. Krause,

Plaintiff,

vs.

FILE NO. 785809

ORDER

Mark K. Kim, M.D., d/b/a Mark K. Kim, M.D., P.A., and Metropolitan Medical Center, a Minnesota non-profit corporation,

Defendants.

The above-entitled Matter came duly on for hearing before the undersigned, one of the Judges of the above-named Court, at Special Term thereof on the 23rd of January, 1985, upon the Motion of Plaintiff for an Order compelling the Defendant Metropolitan Medical Center to produce its Chief Executive Officer to be deposed by Plaintiff no later than January 28, 1985; for an Order compelling Defendant Metropolitan Medical Center to produce documents pursuant to Plaintiff's May 3rd, 1982, request for production of documents; for an Order consolidating two other files with

the instant file; and for an Order awarding the Plaintiff the reasonable expenses he incurred in bringing this Motion. Defendant Metropolitan Medical Center brought a Countermotion for a Protective Order pursuant to Min. R. Civ. P. 26.03.

Robert L. Krause appeared pro se.

Keith A. Dunder, Esq., appeared for and on behalf of Defendant Metropolitan Medical Center.

Based upon all the files, records, and proceedings herein, the Court, having been fully advised in the premises,

IT IS HEREBY ORDERED:

1) That Defendant Metropolitan Medical Center produce Frank Larkin for deposition by Plaintiff on or before February 8, 1985.

2) That Plaintiff's Motion for an Order compelling Production of Documents is, in all respects, denied.

3) That Plaintiff's Motion to consolidate Hennepin District Court Files numbered 772726 and 773046 with the instant file is, in all respects, denied.

4) That Plaintiff's Motion for his expenses incurred in bringing this Motion is, in all respects, denied.

5) That Defendant Metropolitan Medical Center's Countermotion for a Protective Order is, in all respects, denied.

BY THE COURT:

Peter J. Lindberg
Judge of District Court

Dated: 1-24-85

February 21, 1985

Mahoney, Dougherty and Mahoney
801 Park Avenue
Minneapolis, MN 55404-1189

Re: Krause vs. Metropolitan Medical
Center, et al.
File No. 82-2010

Dear Mr. Dunder:

I have reviewed my notes from the recent deposition of Frank Larkin, and thought I should write you this brief note, sharing my reflections.

First, although I have of course not yet seen the transcript, it is my impression that your conduct at the deposition went far beyond that necessary to protect your client. It's my recollection that you were making a conscious effort to confuse the issues, to thwart my efforts to obtain information Mr. Larkin could and should have revealed , and generally to harass my efforts to develop my case.

I found your conduct offensive — not only to me personally, but to the quest for truth that should be at the heart of the judicial process.

Whether you disrespect pro se litigants, or dislike me personally, or whatever, I invite you to set aside your prejudices and henceforth cooperate with me to expedite the readying of this case for trial — extending no less courtesy than you would to an attorney at law. I can assure you that I have brought my claim in good faith to redress wrongs done to me. I will not abandon what I feel is a legitimate grievance because of harassment or brow-beating.

Second, conduct as demonstrated in your unilaterally scheduling Mr. Larkin's deposition for February 20th, in blatant disregard of Judge Lindberg's Order and of my schedule, will no longer be tolerated. I will be accommodating and cooperative

Third, this is to confirm that I have, by my previous correspondence to you, complied with Judge Rosen's Order requiring disclosure of expert witness names relevant to my cause of action against your client. My experts will testify regarding issues of duty, breach of duty and causation in establishing our prima facie case of negligence.

Fourth, this is my formal request that you produce the following documents as you agreed at Mr. Larkin's deposition. Additional documents may be requested after reading the deposition transcript.

1. Minutes of the executive committee of the medical staff relating to the approval and subsequent reports relating to the outpatient pain clinic relating to acupuncture.

2. Correspondence, reports or any other data relating to the formation and operation of the hospital service of acupuncture.

Fifth, I would like to complete the taking of Mr. Larkin's deposition in the near future, at my office in view of the uncomfortable and unavailable conference space causing two moves.

Yours very truly,

Robert L. Krause

Robert L. Krause
8131 Wentwood Hills Drive
St. Louis Park, MN 55426

State of Minnesota)
)
County of Ramsey)

David J. Thoelke, being first duly sworn upon oath, states:

1. That I am an attorney at law, licensed in the State of Minnesota, with office at 806 Pioneer Building, Saint Paul, Minnesota 55101.

2. That I have known Robert L. Krause for approximately two and one-half years.

3. That from my acquaintance with Mr. Krause, I have learned that he has, on prior occasions, represented himself as attorney pro se. One such occasion involved a business matter, another involved a civil matter in which he was a defendant. To the best of my knowledge, prior to the present two pending matters, he has not represented himself in a personal injury type action.

4. That he has been a Plaintiff, in a personal injury matter represented by counsel, on one previous occasion, to my knowledge. That cause of action arose out of a traffic accident in Hennepin County in 1976.

5. That my practice does not involve the trial of malpractice or personal injury matters. Accordingly, I have recommended to Mr. Krause that he retain an attorney to represent him in the two pending medical malpractice actions. I have declined to represent him as his attorney in said matters.

6. That I have consulted with and advised Mr. Krause on matters unrelated to the present pending actions.

7. That I have assisted Mr. Krause in the preparation of documents in connection with the two pending actions, and have answered questions he has asked, from time to time. My purpose in doing this has been to give him needed assistance until such time as he obtains counsel to represent him.

Such assistance has been requested and given on an ad hoc basis. I verily believe that Mr. Krause could use the assistance of an attorney at depositions and proceedings before the Court to discuss options with him, recommend objections to questions or procedures, and to answer questions on procedural matters that will confront Mr. Krause as a pro se litigant. Such assistance is necessary to prevent him from being at a great disadvantage in dealing with experienced trial attorneys. Having such assistance will expedite proceedings throughout by resolving confusion about procedural matters and by providing guidance which may help this pro-se litigant focus on the issues involved, and avoid getting off on tangents.

8. That Mr. Krause has consulted with or received advice from other attorneys in St. Paul and Minneapolis relative to the two pending cases.

9. That Mr. Krause, I believe, has the right to proceed pro se without giving up the right to obtaining procedural or technical advice from an attorney, just as he has the right to consult lawbooks and other sources of information.

10. That I verily believe that Mr. Krause is sincere, that he has brought the present actions in good faith, and that he may prevail in one or both of the two pending actions.

11. That I will not be attending the hearing scheduled in the two matters on May 19, 1983, as such attendance would have no value unless and until the Court grants the second part of Plaintiff's Motion, and allows the limited participation right which Mr. Krause seeks.

Further Affiant saith naught.

David J. Thoelke

Subscribed and sworn to before me this 18 day of May, 1983.

Notary Public